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Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1855

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL,
Petitioner

v.

RUSSELL A. MUTH, JR, et al.,
Respondents

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

BRIEF FOR PETITIONER

LeRoy S. Zimmerman
Attorney General

Maria Parisi Vickers
Chief Deputy Attorney General
Chief, Eastern Region
Counsel of Record

John G. Knorr, III
Chief Deputy Attorney General
Chief, Litigation Section

Gregory R. Neuhauser
Senior Deputy Attorney General

Attorneys for Petitioner

OFFICE OF ATTORNEY GENERAL
206 State Office Bldg.
Philadelphia, PA 19130
Telephone (215) 560-2402

10 5 PM

QUESTIONS PRESENTED

1. Whether the Education for All Handicapped Children Act, which makes no mention of the Eleventh Amendment and does not refer to State liability, thus fails to contain the requisite unmistakable expression of Congressional intent needed to abrogate the Eleventh Amendment immunity of the States?

2. Whether Pennsylvania's Secretary of Education, a cabinet member and chief executive officer of the Department of Education, should be precluded from deciding special education administrative appeals under the Act?

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 839 F.2d 1133 (3d Cir. 1988) and may be found in the appendix to the petition for writ of certiorari. (Pet. App. 1a).

The District Court opinion of June 2, 1986 is reported at 646 F.Supp. 280 (E.D. Pa. 1986) and may be found in the appendix to the petition for writ of certiorari. (Pet. App. 83a).

The District Court opinion of August 28, 1986 has not been reported but may be found in the appendix to the petition for writ of certiorari. (Pet. App. 112a).

The District Court opinion of February 20, 1987 has not been reported but may be found in the appendix to the petition for writ of certiorari. (Pet. App. 191a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was filed on January 29, 1988. (Pet. App. 1a) and the petition for certiorari was filed within ninety days thereafter. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

> or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ...

U.S. Const. Amend. XIV, Sec. 1.

> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. Amend. XIV, Sec. 5.

STATUTORY PROVISIONS INVOLVED

20 U.S.C. §1400. Congressional Statements and Declarations

...

(b) Findings

The Congress finds that -

...

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

§1415. Procedural Safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under

this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to -

...

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

20 U.S.C. §1415(b)

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

20 U.S.C. §1415(e)

Civil action; jurisdiction; attorneys fees

...

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. §1415(e)

...

(4)(G) The provisions of subparagraph (F) [describing situations when the court shall reduce attorneys fees awarded under this section] shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

STATEMENT OF THE CASE

1. This case arises out of a dispute over the appropriate educational program for a gifted handicapped child. Respondent Russell A. Muth, Jr., alleged that his son, Robert Alexander Muth (Alexander), was denied a "free, appropriate public education" in violation of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-172, codified at 20 U.S.C. §§1400-1461, (the "Act" or "EHA"). (Pet. App. 141a).

The defendants were the Pennsylvania Secretary of Education,[1] the Central Bucks (Pennsylvania) School District,

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[1]The original defendant was Secretary Robert C. Wilburn, sued only in his official capacity. His current successor in office is Thomas K. Gilhool, the petitioner in this Court.

and Dr. Thomas L. Newman, Superintendent of the School District. (School District defendants) (Pet. App. 1a-8a).

2. Alexander, already diagnosed as learning disabled, first enrolled in the Central Bucks School District in 1980 where an individualized educational program (IEP) placed him in a learning disability resource room for some subjects and "mainstreamed," or placed him in regular classes, for other subjects. Changes in Alexander's IEP were made with his father's participation and approval until June of 1983, when the School District proposed placing Alexander in the learning disabled classroom setting for all substantive subjects in the 1983-84 school year. (Pet. App. 9a-11a).

Muth disagreed with the School District's proposal, requested a due process hearing and requested that no change be made in Alexander's current placement until a hearing was held. In September 1983, Muth enrolled Alexander in a private school in Massachusetts for learning disabled students.[2] (Pet. App. 13a).

The due process hearing was held on September 30, 1983 before an impartial hearing officer who, on October 31, 1983

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[2]Alexander remained at that private school until April 1985 when he was transferred by his father to Wyncote Academy, a private school in Pennsylvania with no special education program. At the beginning of the academic year 1986-87, Alexander returned to the Central Bucks School District. (Pet. App. 134a-135a)

made recommendations which included changes in the IEP proposed by the School District but did not order that Alexander be placed in a private school as Muth had requested. Both Muth and the School District appealed the hearing officer's decision to the Secretary of Education who remanded the case to the hearing officer with instructions to the School District to revise the IEP. The revised IEP was presented to the hearing officer, but Muth raised objections and on July 25, 1984 the hearing officer decided that the modified IEP was an appropriate program of Education for Alexander.

Muth appealed to the Secretary and on October 24, 1984 the Secretary affirmed the hearing officer's decision. While these administrative proceedings were underway, on April 27,

1984, Muth filed suit in federal district court. (Pet. App. 13a-17a).

3. In the District Court, Muth claimed that Alexander was denied a "free, appropriate public education" in violation of the EHA, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504") and 42 U.S.C. § 1983. Muth sought reimbursement for his son's tuition for the private school placement he claimed was the suitable placement for his child. (J. App. 11-13, 35). Thereafter, on March 21, 1985, Muth sought and was granted leave to file an amended complaint in which he dropped the claims pursuant to § 504 and § 1983. (J. App. 6, 39). In response to the Secretary's motion for summary judgment, the District Court held that the Eleventh Amendment barred Muth's claim for retroactive monetary relief against the Secretary but left open the

question of whether injunctive relief would be appropriate. (J. App. 50-51).) Muth was then permitted to file a second amended complaint in which the District Court allowed him to raise two issues against the Secretary: (1) whether the Secretary's involvement in the due process hearing violated Muth's due process rights under the EHA;[3] and (2) whether the delays in the due process procedure violated plaintiff's rights under the EHA. The District Court did not permit Muth to raise damage claims based on the Fourteenth Amendment and expressly precluded a claim which sought tuition reimbursement from the State (J. App. 80-82). The second amended complaint also

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[3]Muth raised this issue for the first time in the second amended complaint.

named the School District defendants who were alleged to have denied Alexander a free appropriate public education in violation of the EHA. The relief sought encompassed declaratory and injunctive relief, reimbursement for private school placement and attorney's fees. (J. App. 100-101).

By memorandum opinion and order of June 2, 1986, the District Court held that Pennsylvania's statutory scheme for providing parents of handicapped children with administrative process violates the provisions of the EHA. More specifically, the District Court held:

> (1) that Pennsylvania's initial hearing and review are both conducted at the state level in contravention of federal law, (Pet. App. 90a-95a);

(2) that even if the initial hearing were a local one, a remand by the Secretary to the hearing officer violates the finality requirement of federal law, (Pet. App. 102a-104a); and

(3) that because the Secretary must be considered an employee of Pennsylvania's state educational agency, he is an improper reviewing officer under federal law. (Pet. App. 101a-102a).

The District Court did not resolve the issue of tuition reimbursement, stating that it would hold a hearing to determine whether the IEP which the School District had proposed would have provided Alexander with an appropriate free education. (Pet. App. 108a). Prior to trial, the District Court advised the Secretary that it would reconsider whether the Eleventh

Amendment presents a jurisdictional bar to an award of money damages against the Secretary, and invited submission of a trial brief on that issue.[4] (Pet. App. 168-169).

4. After a bench trial, the District Court issued an opinion and order on August 28, 1986, holding that the IEP prepared by the School District for the 1983-84 school year would have afforded Alexander an appropriate education. (Pet. App. 156a) However, in light of the procedural violations previously found, and without any finding of substantive due process deprivations, the District Court held

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[4]In effect, the District Court thus modified its previous ruling and permitted an amendment to the second amended complaint, to allow Muth to raise a money damage claim against the Secretary.

that Muth was entitled to reimbursement for one year's private school expenses for his handicapped child. (Pet. App. 166a). While acknowledging that the School District was prepared, in September 1983, to provide Alexander an appropriate education, the District Court nonetheless found that the 10 month delay caused by the Secretary's remand precluded Muth (1) from participating in the process which directly affected his son's education, (Pet. App. 165a), and (2) from reevaluating (in December 1983 rather than in October 1984) the wisdom of Alexander's private school placement. (Pet. App. 166a). Consequently, the District Court held that the appropriate remedy was reimbursement for one full year of tuition at the private school.

The District Court further held that the EHA abrogated the Eleventh Amendment immunity of the states; consequently, the Secretary, sued in his official capacity, was found to be jointly and severally liable with the School District for the reimbursement award made to Muth. (Pet. App. 174a-177a; 187a-188a). In an opinion filed on February 20, 1986, the District Court awarded Muth attorney's fees to be paid jointly by the Secretary and the School District. (Pet. App. 210a-212a).

5. The parties cross-appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment of the District Court on every issue except

its award of attorneys' fees. [Pet. App. 4a-5a].[5] That issue was remanded to the District Court for allocation of fees in accordance with Hensley v. Eckerhart, 461 U.S. 424 (1983). [Pet. App. 81a-82a].

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[5]The Court of Appeals saw no need to reach the issue of whether Pennsylvania's two-step hearing and review procedure conforms to federal law. (Pet. App. 52a-58a). Therefore, a reversal by this Court on the issue of the Secretary's participation in the administrative review procedure will require a remand to the Court of Appeals for a decision on that unaddressed issue.

The Secretary's petition for rehearing en banc was denied. He sought and was granted review from this Court on the issues of the Eleventh Amendment and the bar to his hearing special education appeals under the EHA. The Secretary's petition for writ of certiorari was granted on October 3, 1988.

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in holding that by enacting the EHA pursuant to Section 5 of the Fourteenth Amendment, Congress abrograted the sovereign immunity of the States as it is constitutionalized by the Eleventh Amendment. Such abrogation is possible, but only when Congress makes "its intention unmistakably clear in the language of the statute," Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985). There is no clear language in the EHA, or the 1986 amendment upon which the Court of Appeals also relies, which even suggests that Congress considered eliminating the States' immunity from suit in federal court.

2. The principle of federalism which this Court repeatedly has recognized demands that Congressional

intent to subject States to suit in federal court be clearly articulated, even when Congress legislates to guarantee constitutionally protected rights. Quern v. Jordan, 440 U.S. 332 (1979).

3. The clear Congressional intent, which has been misunderstood by the Court of Appeals, is that the EHA be a cooperative effort between the States and the Federal Government. The purpose of this joint effort is the education of handicapped children. Exposing the States to money damage awards for some misjudgment in the placement of a child or for a procedural due process violation defeats the goals of the statute by depleting the very funds that States can use for the education of handicapped youngsters.

4. The Court of Appeals also erred by holding that the EHA's due process hearing procedure precludes Pennsylvania's Secretary of Education from acting as an impartial reviewing officer because he is the employee of an agency "involved in the education of the child."

Under this view, the Secretary is involved in the education of every child in Pennsylvania simply because he is the responsible supervisor of the entire educational system in the State. This interpretation of the statutory language is at odds with the expressed goal of the EHA to make the Secretary responsible for the delivery of educational services to the handicapped; moreover, it is contrary to traditional concepts of impartial decision making.

I. CONGRESS DID NOT ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY WHEN IT ENACTED THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

In a long line of cases, this Court consistently has interpreted the Eleventh Amendment as constitionalizing the principle of state sovereign immunity, thus precluding suits against a State in federal court by citizens of that State or other States. Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); Edelman v. Jordan, 415 U.S. 651, (1974); Employees of Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare, 411 U.S. 279 (1973); Parden v. Terminal Ry. Co., 377 U.S. 184 (1964); Hans v. Louisiana, 134 U.S. 1 (1890).

The Eleventh Amendment is applicable to suits seeking money damages, Edelman v. Jordan, as well as suits seeking equitable relief, Pennhurst, 465 U.S. at 100-101; Alabama v. Pugh, 438 U.S. 781 (1978). A State may consent to suit against it in federal court, thereby waiving its immunity, but Pennsylvania has specifically withheld consent. 42 Pa.Cons.Stat. §8521(b), Pennhurst, 465 U.S. at 103 n. 12. In the absence of consent, a suit against the State or one of its agencies is proscribed by the Eleventh Amendment. Pennhurst, 465 U.S. at 100.

Moreover, the Eleventh Amendment is a complete bar to suit against a state official who is sued, as the petitioner is sued here, in his official capacity, regardless of whether the suit seeks

damages or injunctive relief. Dugan v. Rank, 372 U.S. 609 (1963); Pennhurst, 465 U.S. at 100-103.

Although this Court has not decided whether prospective injunctive relief may be granted against state officials for violations of federal statutory law, Pennhurst, 465 U.S. at 104 n. 13,[6] retroactive monetary relief is barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. at 666-667.

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[6]Edelman v. Jordan, is not to the contrary. In Edelman, the state conceded liability for prospective relief. 415 U.S. at 664.

A. In this case, the Court of Appeals for the Third Circuit has misapplied the decisions of this Court when it held that Congress, by enacting the EHA pursuant to §5 of the Fourteenth Amendment, has abrogated the States' Eleventh Amendment immunity to suit. (Pet. App. 71a-72a). The Secretary concedes that Congress has the power to abrogate the States' Eleventh Amendment immunity without the States' consent when it legislates to enforce the substantive provisions of the Fourteenth Amendment; however, there must be unequivocal evidence of such abrogation. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). This Court has long held that the mere literal inclusion of the States among those to whom a statute applies does not

suffice to eliminate the States' Eleventh Amendment immunity. Scanlon, supra, 473 U.S. at 245-46; Employees, supra, 422 u.S. at 283-85.

In Quern v. Jordan, 440 U.S. 332 (1979) the Court reaffirmed the holding in Edelman v. Jordan, that the Civil Rights Act of 1871, 42 U.S.C. §1983, does not abrogate the States' Eleventh Amendment immunity despite the Act's clear intent to vindicate individual rights protected by the Fourteenth Amendment. There the Court stated:

> There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive providence of the individual states.

[N]either logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States.

. . .

Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42nd Congress believed that §1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act, along with the other evils that they thought would result from the Act. Instead, §1 passed only with limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting §1. We can only

> conclude that silence on the matter is itself a significant indication of the legislative intent of §1.

Quern, 440 U.S. at 342-343.

Certainly the rights Congress sought to protect by the passage of the Civil Rights Act are as constitutionally compelling as the right to equal education which is being advanced by the EHA, yet Congress did not abrogate the States' immunity in 1871 and it has not done so in the EHA.

The Third Circuit's conclusion that, in enacting the EHA Congress abrogated the States' constitutionally guaranteed immunity, fails to satisfy the stringent criteria defined by this Court in Scanlon. There, the Court refused to find such abrogation of immunity in Congressional passage of the

Rehabilitation Act, 29 U.S.C. §794[7] and announced that it will look no further than the four corners of a statute to discern Congressional intent to abrogate State sovereign immunity. The Court said:

> In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory language. To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits

---

[7]The statute at issue in Scanlon is similar to the statute at issue here. Both provide a private right of action for prospective relief for all aggrieved parties and neither explicitly provides a damage remedy or other retroactive relief. Both involve programs through which States receive federal assistance.

> against the States in federal court. We decline to do so and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

473 U.S. at 242 (citations omitted).

Because abrogation of state immunity alters the "constitutionally mandated balance of power between the States and the Federal Government," Ibid. (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556 (1985) (Powell, J., dissenting)), the Court emphasized that an unusually high standard of certainty of Congress' intent is required to strip the states of their immunity before it will permit lower courts to upset this balance. The Scanlon approach "ensures such certainty." 473 U.S. at 243. This

unusually strict rule of construction is necessary to guard against expansion of federal court jurisdiction by judicial interpretation and to ensure that lower federal courts will not misinterpret the intent of Congress at the expense of the federal system. Id.

Although Congress has the power to override Eleventh Amendment immunity, it does not necessarily follow that it exercised such power in enacting the EHA. In fact, all indicia are to the contrary; there is no reference, either in the language of the statute itself or in the legislative history, that Congress intended this statute to abrogate rights reserved to the States by the Eleventh Amendment. Undeterred by the standard of clarity required by this Court in Scanlon, the Third Circuit found Congress's "unmistakably clear"

intent to abrogate the effect of the Eleventh Amendment in the preamble to the EHA:

> ... it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

20 U.S.C. §1400(b)(9) (emphasis supplied). (Pet. App. 72a).

The Court of Appeals found additional support for its holding in the following statutory language:

> Any party aggrieved by the findings and decision [made in the administrative process] shall have the right to bring a civil action ... in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

20 U.S.C. §1415(e)(2). (Pet. App. 73a-74a).

Finally, the Third Circuit relied on the Handicapped Children's Protection Act, Pub.L. 99-372, 100 Stat. 796, the 1986 amendment to §1415(e), which provides for counsel fees in certain circumstances and in which Congress notes that certain provisions in the amendment shall not apply if "the Court finds that the State or local educational agency unreasonably protracted the final resolution of the action..." 20 U.S.C. §1415(e)(4)(G). (Pet. App. 76a).

On this meager basis, and despite the fact that the statute makes no mention of the Eleventh Amendment and nowhere states that Congress focused precisely on state liability to private parties, the Third Circuit has discerned the abrogation of a sovereign State's immunity. In so doing, the Court of

Appeals has swept aside, without so much as a passing glance, this Court's repeated admonition that the fundamental values of sovereign immunity will not be abrogated unless Congressional intent to do so is unequivocally and unmistakenly clear.

B. In arriving at its holding, the Third Circuit relied on the decision of a divided panel in David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, 475 U.S. 1140 (1986), which held that the EHA effectively abrogates the sovereign immunity of States. (Pet. App. 74a-75a).

Dissenting from his colleagues in the First Circuit, Judge Torruella acknowledged the binding provisions of the Eleventh Amendment and stated:

> ... I believe that the present situation under the Education for the Handicapped Act, 20 U.S.C. §1401 et seq., is indistinguishable from that in Atascadero under the Rehabilitation Act, and because, as in Atascadero, there is lacking unmistakably clear intention in the language of this legislation to submit the Commonwealth of Massachusetts to suit in federal court for violation of its statutes, I dissent.

David D., 775 F.2d at 425.

Taking a contrary position to that of the First and Third Circuits, three other Circuits have not found in the language of the statute that unmistakably clear Congressional intent necessary to abrogate the immunity of

the States.[8] This fact alone, that federal appellate courts differ on whether the EHA abrogates Eleventh Amendment immunity, further supports the conclusion that Congressional intent is not unmistakably clear. If such intent is not clear to federal appellate courts, it cannot have been clear to the legislators who voted on the statute or

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[8]In Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909 (1983), the Eighth Circuit rejected the contention that the EHA abrogates States' immunity; relying on the standard announced in Scanlon, two other Circuits specifically have held that Congress did not abrogate the States' Eleventh Amendment immunity when it enacted the EHA. Gary A. v. New Trier High School District No. 203, 796 F.2d 940 (7th Cir. 1986); Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986), affirmed on other grounds sub. nom. Honig v. Doe, No. 86-728 (Jan., 1988).

to the States who chose to voluntarily participate in the EHA on the basis of the conditions explicit in the language of the statute.

In an attempt to sidestep the persuasive reasoning of its sister appellate courts, and perhaps recognizing that its contrary conclusion belies the existence of the clear abrogation language Scanlon demands, the Third Circuit pointed to the 1986 amendment to the EHA to bolster its decision, concluding that the decisions of the Seventh, Eighth and Ninth Circuits pre-date that amendment and, consequently, their reasoning and conclusion are no longer tenable. (Pet. App. 76a). The subject matter of that amendment, however, is attorney's fees; the amendment says nothing about state liability to private parties and

does not in any way expand the category of litigants who may sue the States for damages. In fact, the language in the amendment relied upon by the Court of Appeals states:

> The provisions of subparagraph (F) [relating to circumstances in which the court shall reduce attorneys' fees] shall not apply in any action or proceeding if the Court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

20 U.S.C. § 1415(e)(4)(G).

If the mere literal inclusion of the States among those to whom a statute applies does not suffice to lift the bar of immunity, Scanlon, 473 U.S. at 245-46, certainly a reference to the States' exposure to attorneys' fees is similarly inconclusive. The Eleventh

Amendment does not, of course, bar an action against state officials for prospective injunctive relief if the Court finds an ongoing constitutional violation, Ex parte Young, 209 U.S. 123, 160 (1908),[9] therefore, in such a case attorneys' fees may be awarded against a

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[9]In Ex parte Young the Court held that a state official acting in conflict with the Constitution is "stripped of his official representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160. This holding incorporates the fiction that a suit to enjoin a state official from enforcing an allegedly unconstitutional State law is not a suit against the State for Eleventh Amendment purposes, even though the consequences of the injunction are felt by the State. The Court has carefully limited the reasoning in Young, recently holding that notice relief and declaratory relief are available only to remedy ongoing violations of federal law. Green v. Mansour, 474 U.S. 64 (1985).

state official. Such an award is consistent with the Eleventh Amendment immunity which the States retain under the EHA and its 1986 amendment.

Just as in the EHA, nothing in the language of its 1986 amendment suggests that Congress even considered, let alone eliminated, the Eleventh Amendment immunity of the States. Moreover, attorney's fees are claims for equitable relief, and immunity from damages does not ordinarily bar equitable relief. See Wood v. Strickland, 420 U.S. 308, 315 n. 6 (1975). While this Court specifically has held that the Civil Rights Act does not abrogate the States' Eleventh Amendment immunity, it also has held that 42 U.S.C. §1988 authorizes attorney's fees against state

officials as part of the costs in §1983 actions. Hutto v. Finney, 437 U.S. 678, 693 (1978). In fact, when this Court held in Scanlon that §504 of the Rehabilitation Act did not abrogate the States' Eleventh Amendment immunity, it certainly was aware that § 505, 29 U.S.C. §794a(b), authorized attorneys' fees in the same manner -- even incorporating the same legislative history -- as § 1988. The fact that attorneys' fees may be awarded against the States, without more, lends no support to the position that Congress has abrogated the States' constitutional immunity.

Finally, Congress knows full well how to make clear its intent to remove Eleventh Amendment protection. At the same time that Congress was enacting the

EHA amendment it was also enacting the Rehabilitation Act Amendments of 1986, Pub.L. No. 99-506, §100 Stat. 1807 (1986), which provide in part that:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29, title IX of of the Education Amendments of 1972, the Age Discrimination Act of 1975 [42 U.S.C.A. §6101, et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d, et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Pub. L. 99-506, §1003(a)(1), 100 Stat. 1845, codified at 42 U.S.C. §2000d-7.

In fact, the language used in the Rehabilitation Act Amendments is particularly significant since it was employed specifically to overrule the decision in Scanlon.[10]

We can assume that when enacting the EHA amendment in 1986 to provide for attorneys' fees, Congress certainly was aware of the decision of the Court in Scanlon and of the decisions of the Seventh, Eighth and Ninth Circuits which

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[10]In their brief opposing the petition for writ of certiorari, Amici suggest that the EHA may be an anti-discrimination statute and might therefore come within the ambit of §2000d-7. (Brief of Amici in Opposition to Petition for Writ of Certiorari, pgs. 12-13). A short answer to this suggestion is that this is the sort of speculation about Congressional intent which this Court has undercut by holding in Scanlon that the abrogation of a State's constitutional immunity from suit in federal court must be unmistakably clear in the language of the statute.

did not find abrogation of States' immunity; at that point, Congress easily could have expressed its intent to abrogate the States' immunity to suit, just as it has done in the Rehabilitation Act Amendments. The fact that Congress did not expressly and unmistakably express that intent compels the conclusion that there was no such intent.

Neither the language of the EHA nor its 1986 amendment provide evidence that Congress intended to sweep away the States' immunity when it legislated in this area. Without such a clear expression of intent, the Third Circuit's opinion must be reversed.

C. By fashioning a damage remedy against the State of Pennsylvania, the District Court and the Court of Appeals have done violence not merely to the delicate constitutional balance which

this Court repeatedly has endeavored to maintain between Eleventh Amendment and Fourteenth Amendment interests, but they also have frustrated the basic and central goals of the EHA.

In enacting a law which sought to ensure equal access to education for handicapped children throughout our nation, Congress realized that its goal could be achieved only if the States entered into a voluntary partnership with the federal government -- a partnership based on a mutual desire to include the weakest and most neglected of its children into the sphere of equal access to educational opportunity. 20 U.S.C. §1400(b)(9). Notwithstanding the federal government's substantial financial contribution to the States pursuant to the provisions of the EHA, the fact remains that the lion's share of the expenses for educating

handicapped children remains the responsibility of the individual States.[11] Pennsylvania's substantial financial investment in the education of its handicapped students is a logical consequence of the fact that education

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[11]During the 1986-87 school year the Commonwealth of Pennsylvania spent approximately 506 million dollars to educate its exceptional children, (under Pennsylvania law, the term "exceptional children" is defined as children "who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services..." 24 P.S. §13-1371 thus, both handicapped and gifted children fall into this category) for an average expenditure of $1870.00 per child. During the same period Pennsylvania was allocated $282.00 per handicapped child under the provisions of the EHA for a total federal contribution of approximately 59 million dollars. Pennsylvania Department of Education, Bureau of Basic Education Fiscal Administration.

has been and continues to be, a matter of local concern -- traditionally and better addressed at the State and School District levels.

By imposing, what is, in effect, a punitive damage award of one year's private school tuition against the State and the School District for a procedural due process violation,[12] the Court of Appeals has misconceived the intent of Congress and the teachings of this Court. It has misconceived the intent of Congress by adding onto the statute a remedy neither envisioned by the legislators nor necessary to achieve the central goal of the EHA. This is so for several reasons.

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[12]Whether the delay caused by the Secretary's remand is indeed a procedural due process violation of constitutional dimensions is not before the Court.

First, the States who voluntarily participate in the EHA presumably wish to comply with its terms; therefore, a money damage award is a sledgehammer approach when a notice of violation would suffice to secure compliance. Second, the statute provides the most effective enforcement mechanism of all: the United States Secretary of Education is authorized to withhold federal funds if a State's program is not in compliance with the statute. 20 U.S.C. § 1416. Third, permitting individual suits against the States for monetary relief -- especially of the punitive nature awarded here -- depletes the very same source of funds which the States could be spending on the education of handicapped children. Fourth, prospective injunctive relief is an available judicial remedy against State

officials, and anyone else, engaging in unconstitutional conduct. Ex parte Young, 209 U.S. 123 (1908). Fifth, since a school district will be party to a suit in the overwhelming number of cases brought by parents of handicapped children, the federal policy of enforcement is satisfied by the availability of tuition reimbursement at the local level. Burlington School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359 (1985).

These various remedies guarantee that State government is both responsive and accountable to the people it serves. While recourse to the federal courts would give parents an additional enforcement tool, Congress, by enacting the EHA without unequivocally abrogating the States' Constitutional immunity, apparently believed that this specific

remedy was not necessary to assure necessary compliance by the States.

The complexity of the States' task in the field of education of the handicapped and the effective enforcement remedies available in the EHA argue against the Court of Appeals' conclusion that States should be liable for monetary awards arising out of individual failure to comply with all the rules and regulations of the program.[13]

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[13]Moreover, even if damages can be awarded under the EHA against a party not shielded by Eleventh Amendment immunity, the Court of Appeals has misconstrued the teachings of this Court in Carey v. Piphus, 435 U.S. 247 (1978). There, a student claimed that he was denied procedural due process because he was suspended from school without an opportunity to respond to the charges against him.

(Footnote continued on next page).

The central goal of the Act is to provide handicapped children with equal access to educational opportunities,

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[13](Footnote continued from previous page).

The Court held that compensatory damages would be appropriate only if the student could prove actual injury caused by the denial of the constitutional right to due process. The Court emphasized that "[rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests..." Ibid at 254. For a deprivation of due process rights the Court approved nominal damages of one dollar. Ibid at 266. Here, the Court of Appeals obviously attempted to vindicate Muth's due process rights when the procedural violations had not, in fact, caused any actual injury to him and his son. Such "vindication" is impermissible in light of the holding in Carey.

that goal is not advanced by awarding money damages against the States who fund the greatest portion of that education and who willingly participate in the EHA. Congress recognized that the remedies inherent in the statute are adequate to ensure compliance and for that reason saw no need to abrogate the States' Eleventh Amendment immunity. This Court is urged to correct the holding of the Court of Appeals and reverse.

II. THE EHA DOES NOT PRECLUDE REVIEW OF DUE PROCESS HEARINGS BY A CHIEF EXECUTIVE OFFICER OF THE STATE AGENCY WHEN THE STATE AGENCY IS NOT INVOLVED IN THE DEVELOPMENT OF THE INDIVIDUALIZED EDUCATION PROGRAM

A. This Court on four occasions has described and analyzed elements of the comprehensive procedural system established by the EHA.[14]

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[14] Honig v. Doe, No. 86-728 (Jan. 20, 1988) (addressing "stay-put" provision); Burlington School Committee (addressing availability of tuition reimbursement remedy for parents who had placed their child in private school during pendency of review procedures); Smith v. Robinson, 468 U.S. 992 (1984) (addressing availability of attorneys fees and relationship to §504 of the Rehabilitation Act of 1973); Hendrick Hudson Central School District Board of Education v. Rowley, 458 U.S. 176 (1982) (addressing standard of federal judicial review).

In each case, this Court noted that Congress "was largely guided" by two landmark trial court decisions: Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F.Supp. 1257 (E.D. Pa. 1971) and 343 F.Supp. 279 (E.D. Pa. 1972) (PARC), and Mills v. Board of Education of District of Columbia, 348 F.Supp. 866 (D.D.C. 1972).[15] This case presents the question of whether Congress, in patterning the EHA on PARC, actually intended to prohibit an important element of the procedural system PARC established.

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[15] See Burlington School Committee, 471 U.S. at 373; Robinson, 468 U.S. at 1010 (referring only to Congress' recognition of "'landmark court cases'"); Rowley, 458 U.S. at 192.

The procedural system of the statute, like that established by PARC, requires first that local schools develop "individualized educational programs" (IEP's) for handicapped children in cooperation with parents or guardians.[16]

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[16]The IEP is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs". Burlington School Committee, 471 U.S. at 368. Parents have a right to "examine all relevant records", Honig, No. 86-728 (Jan. 20, 1988), to participate in the IEP planning conference, and to an opportunity "to present complaints concerning any aspect of the local agency's provision of a free appropriate public education". Ibid.

If parents are dissatisfied with the resolution of any complaint, they have the right to an impartial review process as follows:

> "Whenever [such] a complaint has been received..., the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit <u>involved in the education or care of the child</u>".

20 U.S.C. §1415(b)(2) (emphasis supplied).

> "If [this] hearing ... is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency <u>which</u>

> shall conduct an impartial review of such a hearing. The officer conducting such review shall make an independent decision upon completion of such review."

20 U.S.C. §1415(c) (emphasis supplied).

This case focuses on the requirements of the "impartial" state review of the initial hearing. Specifically, the parties agree that, like the initial hearing, the review cannot be conducted by an employee of an agency which is "involved in the education of the child".[17]

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[17]The report of the Senate Committee which first developed the impartiality requirement suggests that Congress may have intended the language "involved with the education of the child" to modify the term "employee", not the terms "agency or unit."

(Footnote continued on next page).

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[17](Footnote continued from previous page).

The Senate Report stated that a hearing "may not be conducted by any State or local educational agency employee who is directly involved in the education of the child." Senate Conf. Rep. No. 94-455, 94th Cong. 1st Sess. 47, reprinted in 1975 U.S. Code Cong. & Ad. News 1470. Subsequently, the Conference Committee deleted the term "directly", but did not specifically indicate any intent to focus on the agency, as opposed to the employee.

Despite this evidence, however, regulations of the United States Department of Education prohibit conduct of a hearing "[by a person who is an employee of a public agency which is involved in the education or care of the child." 34 C.F.R. §300.507. Petitioner here accepts this regulation in light of the ambiguity in the statute. The question, therefore, is whether the Department of Education is "involved" in the education of the child.

The parties disagree, however, whether a State Department of Education is necessarily involved in the education of the child merely because of its general oversight role over special education. The state agency is only "involved in the education of the child" in those circumstances in which the agency is directly providing services to the child or has otherwise participated in the development if the IEP. Moreover, the Secretary of Education, petitioner here, is not an employee of the state agency but a constitutionally appointed member of the State's executive branch, 71 P.S. §67.1(d)(1), whose function is to establish and implement statewide educational policy. Consequently, he is far removed from the individual disputes that arise between parents and the local school districts which are directly

involved in the education of the child.[18]

B. Because Congress generally adopted the "due process hearing" system which originated in the PARC decree, PARC provides the starting point for analysis of the EHA. See Rowley, 458 U.S. 176 (1986), (relying on PARC's standard of judicial review to determine standard for EHA).

In PARC, the goal was to assure public accountability by placing ultimate responsibility for the education of each individual child on the one person who can combine both policymaking and implementing functions -- the State Secretary of Education.

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[18]Muth has not argued that the Secretary of Education is a biased reviewer for any reason other than that he is an employee of the Department.

The decree provided "that the Secretary of Education shall be responsible for assuring that every mentally retarded child is placed in a program of education and training appropriate to his learning capacities...." 343 F.Supp. at 313. (Consent Decree §40(a)). The reasons: only the Secretary was deemed sufficiently in the public eye that educational decisions would be publicly accountable and only the Secretary was deemed to wield sufficient power to ensure that the best educational decisions were made and executed.

The "due process hearings" served in part as a mechanism for the Secretary to carry out this responsibility. The amended stipulation in PARC provided:

> "The hearing officer shall be the Secretary of Education, or a person designated by him acting in his stead, but shall not be an officer, employee or agent of any local district of intermediate unit in which the child resides". (Amended Stipulation ¶3(L)).

343 F.Supp. at 305.

Unlike local school districts, therefore, the State Department of Education and especially the Secretary, were given the authority and the responsibility, subject to judicial review, to serve as the guardian of the handicapped.

Placing responsibility on the Secretary had the added benefit of institutionalizing a system to educate the Secretary about how to fulfill his overall responsibilities. From below, hearings assured the Secretary a constant flow of information about the

educational adequacy of programs for individual students. From above, meaningful judicial review would assure that the Secretary would learn from his mistakes and conform future decisions to judicial interpretations of the law. The hearings would provide the Secretary of Education the information necessary to fulfill his obligation "directly [to] provide ... and operate programs" for handicapped children if handicapped children were not properly served by local school districts or "otherwise provided for." (Amended Consent Decree ¶51). 343 F.Supp. at 315

C. A close examination of the language of the statute suggests that Congress adopted the principle of impartiality in PARC. Although a court should attempt to give effect to all of

a statute's terms, Reitel v. Sonotone Corp., 442 U.S. 330, 339 (1979), the decision of the Court of Appeals would make superfluous Congress' focus only on agencies "involved in the education of the child."

Section 615(b)(2) of the statute, 20 U.S.C. §1415(b)(2), provides that a hearing "shall be conducted by the State educational agency or by the local educational agency or intermediate unit, as determined by State law." (Emphasis supplied). In other words, the hearing is to be conducted either by the state agency or by the school district or intermediate unit serving the child. Under the analysis of the Court of Appeals, all agencies that might conduct hearings would be "involved in the education of the child" because, by the terms of the EHA itself, they all must exercise at least general

oversight of handicapped children. If Congress had intended such a result, it should therefore have prohibited conduct of a hearing in all cases "by an employee of <u>such</u> agency or unit."

Instead, however, §615(b)(2) only prohibits conduct of the hearing "by an employee of such agency or unit <u>involved in the education or care of the child</u>". <u>Ibid</u>. (<u>Emphasis supplied</u>). Congress therefore did not believe that all agencies conducting hearings were necessarily involved in the education of the child and wished to distinguish between involved and uninvolved agencies. By failing to make such a distinction, the decision below eradicates the significance of the modifying phrase "involved in the education of the child."

Rather than intending this phrase to be superfluous, Congress could only have intended the distinction made in PARC. "involved in the education of the child" means what it says; it refers not to agencies exercising oversight of all handicapped children, but only to those agencies or units actually providing "the child" with services and actually helping to develop the IEP.

In some cases, therefore, this standard does reach state agencies. Congress was aware that state agencies directly provide educational services in some cases and therefore are directly participating in the development of IEP's. For example, the Pennsylvania Department of Education directly manages three special state schools. Similarly,

in Mills, the other landmark case on which Congress relied, the Board of Education of the District directly ran the schools. The decree in that case accordingly provided that hearing officers would not "be an official, employee or agent of the Public School System." Even under the EHA itself, the state agency must in some circumstances provide educational services directly to a child. 20 U.S.C. §1414(d). Rather than attempt to write a blanket rule for all cases, Congress adopted a standard that reflected the numerous educational arrangements throughout the United States while focusing at all times on actual involvement with "the child."

This interpretation of the statute is not only consistent with the language of the statute, it is also consistent

with standards of impartiality. In general, prior exposure or knowledge of the nature of issues involved in a dispute, even engagement in policy-making, does not provide a disqualifying bias but rather is considered a benefit of the administrative process. See, e.g., Hortonville Joint School Dist. No. 1 v. Hortonville Educational Ass'n, 426 U.S. 482, 493 (1976) (decisionmaker is not "disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute"); United States v. Morgan, 313 U.S. 409 (1941) ("underlying philosophy" by cabinet secretary did not render him incapable "of judging a particular controversy fairly on the basis of its own circumstances"). See generally

3 K. Davis, Administrative Law Treatise §19:2, at 372 (2d ed, 1980) ("The law is entirely clear that an announced previous position about law or policy is not a disqualification for exercise of judicial power."). Bias concerns arise only from prior involvement in the decision under review or prejudgment of the facts of a particular case. See Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (an adjudicator should not "have participated in making the determination under review"); Davis, supra, §19:4, at 382 ("[o]ne who prejudges adjudicative facts ... may be disqualified"); 1 Koch, Administrative Law and Practice §6.7, at 439 (1980).

This conventional view animated PARC and it is therefore likely to have influenced Congress here: due process hearings exist to provide parents with a forum to challenge the decision of

school officials. Obviously, neither hearings nor reviews should be conducted by anyone closely associated with the very school officials whose educational plan a parent rejects. In general, however, the state agency and its Secretary are not associated in this way. They are the watchdogs, not the associates, of the school officials who have prepared the IEP rejected by the parents.[19]

In contrast to this interpretation of impartiality, which is consistent with the responsibility placed by the statute on state agencies, the Court of Appeals offered no explanation of how its interpretation could further the purpose of the Act. The decision below

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[19]Petitioner here supervises 501 school districts and 29 intermediate units. 24 P.S. §9-952.

refers vaguely to furthering "the ultimate objectives of the process." It also states that Congress desired "decisionmakers who are not subject to the kind of pressures that employees of an educational agency would necessarily feel." [Pet. App. 48a]. But neither the Court below, nor any lower court that has rendered a similar ruling, could provide other than a conclusory explanation of partiality.[20]

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[20]Systems guaranteeing independence of administrative law judges exist to insulate them from the initial decision in that same case by other members of the agency. When no member of an agency has made a decision under review, the need for guarantees of independence evaporates. Administrative law judges do not exist generally to provide a check on the agency itself; they are a part of the agency and indeed are normally "employees" of the agency. Frequently, decisions of the administrative law judges are themselves reviewable by the heads of an agency. The check on the agency itself comes from judicial review.

In essence, the decision below took an administrative model from other systems and imposed it out of context. The decision gratuitously imposes a purely judicial model on what "framers of the law viewed ... as a means of providing a relatively informal, inexpensive and prompt remedy when agreement could not be reached in the educational planning process." U.S. Dept. of Education, Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act, 75 (1987). As a 1982 study revealed, issues presented at due process hearings are quintessentially decisions of educational policy; they are chiefly decisions involving the appropriateness of a child's school placement, the appropriateness of a student's program

and services, or the appropriateness of the evaluation. U.S. Dept. of Education, Fourth Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act 45 (1982).

Congress did not seek uniformed decisionmakers, but decisionmakers informed by the experience of working in and struggling with the problems of special education. Given the educational nature of the decisions, it is critical that the agency and the official directly responsible for ensuring statewide compliance with the EHA not be excluded from the decisionmaking process.

D. When a Senate Subcommittee began developing the due process requirements of the EHA, the PARC plaintiffs advised the subcommittee to adopt this principle of accountability: "The ultimate responsibility and authority to assure a free public education appropriate to the educational needs of each school aged mentally retarded child should lie with the Secretary of Education." Hearings before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 93rd Cong., 1st Sess., Part 3, 1513 (1974) (prepared comments of Pennsylvania Association for Retarded Children) (emphasis supplied). The Senate Committee accepted this advice, and its Report stated that the

"Committee bill has been designed [inter alia] ... to assure sole responsibility for the education of all handicapped children by the State educational agency." S.Conf.Rep. No. 94-168, 94th Cong., 2nd Sess. 29, 47, reprinted in U.S. Code Cong. & Ad. News at 1437-38.

On its face, therefore, the EHA makes the "State educational agency ... responsible for assuring that the requirements of" the statute are carried out. 20 U.S.C. §1412(6). The state educational agency must set forth a plan for the education of the handicapped, and this plan must provide guarantees of appropriate education. 20 U.S.C. §1413. The state educational agency is responsible for "the development and implementation of a

comprehensive system of personnel development" including training and the dissemination to teachers of "significant information derived from educational research, demonstration and similar projects". 20 U.S.C. §1413(a)(3)(A). The state educational agency must adopt "where appropriate, promising educational practices and materials". 20 U.S.C. §1413(a)(3)(B).

Furthermore, the state educational agency must judge the adequacy of a local educational agency's programs. 20 U.S.C. §1414(b). If those programs are inadequate, the state agency should cut off funds. 20 U.S.C. §1414(b)(2)(A)(i). As in PARC, the state agency should even

"provide special education and related services directly to handicapped children" if those children are not otherwise served. 20 U.S.C. §1414(d).

Like the parties in PARC, Congress also expected due process hearings to complement the other state agency functions. For example, in the 1975 amendments, Congress required that hearings either be conducted initially by the state agency or be reviewed by the state agency. Pub.L. 94-142, §615(b), codified at 20 U.S.C. §1415(b). If Congress did not intend hearing officers to have a special affinity with the state agency, Congress had no reason to require State involvement in administrative review.

In addition, the statute requires that due process hearing decisions serve both as a means of informing the State agency of local program inadequacies and of helping to stimulate State responses. In determining the adequacy of a local educational agency's programs, the state agency must "consider any decision made pursuant to a [due process] hearing... which is adverse to the local educational agency or intermediate educational unit involved in such decision." 20 U.S.C. §1414(b)(3). By making due process hearing decisions subject to judicial review, Congress assured a judicial check on State activities.

In Rowley the Court recognized the relationship between the EHA's hearing process and the statute's mandate that the State be the responsible educational agency. This Court held that the State's responsibility of "acquiring and disseminating" knowledge of good practices, and of "adopting" those practices where appropriate, constituted a "clear statutory directive" that Congress did not intend "courts to overturn a State's choice of appropriate educational theories in a [due process] proceeding." 458 U.S. at 207-08. This Court recognized, therefore, that due process hearings are themselves means by which state agencies learn of, adopt and disseminate promising practices. Congress could not logically

have intended state agencies to be responsible for developing promising educational policies and yet have intended the head of a state agency to defer to the educational theories of hearing officers outside the employment of the agency.

The EHA therefore parallels the PARC decree in important ways that cast doubt on any claim that Congress intended the impartiality requirement announced by the Third Circuit. Like PARC, the EHA relies on the state educational agency to assure appropriate education for each child. Like PARC, the EHA uses the due process hearing mechanism to help accomplish that goal. Forbidding the State Secretary of Education from involvement would undercut these goals.

It would remove from the Secretary the ultimate responsibility for the education of each child; it would therefore reduce the Secretary's accountability to the public and to the courts. The decision below is therefore inconsistent with the structure of the EHA and with its origins in the PARC decree.

E. The Court of Appeals and every other decision supporting its position have erroneously relied on language in the Conference Report synthesizing Senate and House versions of the EHA.[21] The Report states in pertinent part:

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[21]Two lower court cases support the holding that the chief executive of a state education agency may review due

(Footnote continued on next page).

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[21](Footnote continued from previous page).

process appeals. Victoria L. v. District School Board of Lee County, 741 F.2d 369, 374 (11th Cir.1984); Brandon E. v. Wisconsin Department of Public Instruction, 595 F. Supp. 740, 746 (E.D. Wisc. 1984). Several cases support the decision below. In each of these cases, the court based its decision primarily on the language of the Conference Report. See Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982), Helms v. McDonald, 647 F.2d 800, 806 n. 9 (5th Cir. 1981), cert. denied, 455 U.S. 946 (1982); Robert M. v. Benton, 634 F.2d 1139, 1142 (8th Cir.1980); Vogel v. School Board of Montrose, 491 F. Supp. 989, 995 (W.D. Mo. 1980). In Mayson by Mayson v. Teague, 749 F.2d 652 (11th Cir. 1984), the Court of Appeals did not independently analyze the Conference Report but simply adopted the holding of other courts that had.

Two Circuit Courts of Appeals have noted the conflicting cases but have not ruled upon the question. See Cain v. Yukon Public School District, 775 F.2d 15, 20 (10th Cir. 1985); Colin K. v. Schmidt, 715 F.2d 1, 5 n. 3 (1st Cir. 1983).

"(b) ...[T]he conferees point out that any [due process] hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial hearing officer since the State or local agency or intermediate unit will be a party to any complaint presented.

(c) no hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings and individuals conducting a review of the local due process hearing; ..."

S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in 1975 U.S. Code, Cong. & Admin. News 1480, 1502.

At first glance, this language does appear to support the decision below. Paragraph (b) states that "any" hearing shall be conducted not by the agency but at the appropriate agency level. But paragraph (b) proceeds to explain the reason for this concern: the Conference Committee did not wish the hearing conducted by the agency when the agency is itself a party to the complaint. The report further suggests an awareness that a State will not always be party to a complaint, for it states that a "State or local agency or intermediate unit will be a party to any complaint." (Emphasis supplied). In fact, state agencies are typically not parties to a complaint. A court should not extend the concern of the Conference Committee out of context; the prohibition on hearings by employees

should not apply even when a state agency is not a party to a complaint.

Paragraph (c) provides even less support to the decision below. Although it equates standards of impartiality for the local and state decision, the standard it enunciates only reiterates the statute. The Report does not prohibit conduct of a hearing by an employee of any "state or local educational agency," but only of such agencies "involved in the education of the child." Like the statute, the Report therefore distinguishes between situations in which state agencies are "involved" and situations in which they are not.

The Conference Report at best is ambiguous. No other language in the legislative history supports such a view. Indeed, of the original House and Senate bills, only the Senate bill

prohibits hearings by employees "involved in the education of the child." S. Rep. No.94-168, 94th Cong., 2d Sess. 29, 47, reprinted in (1975) U.S. Code. Cong. & Admin. News 1425, 1453, 1470. Nothing in the Senate Report, however, suggests an intent to go beyond the PARC restriction. Nor did any witness testify in favor of a tighter restriction. The Conference Report itself expressed no reason for such a significant change from PARC.

In arriving at its holding the Court of Appeals failed to consider that:

> "[I]n expounding a statute we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy."

Pennhurst State School and Hopsital v. Halderman, 451 U.S. at 18.

In the absence of clearer statutory language or legislative intent, in light of the structure of the statute, the language of the statute, and the alternative interpretation's failure to accomplish any reasonable purpose, this Court should hold that the Court of Appeals erred in grafting onto the EHA a standard of impartiality not envisioned or required by Congress.

CONCLUSION

For the foregoing reasons, petitioner asks the Court to reverse the judgment of the Court of Appeals.

LeRoy S. Zimmerman
Attorney General

Maria Parisi Vickers
Chief Deputy Attorney General
Chief, Eastern Region
Counsel of Record

John G. Knorr, III
Chief Deputy Attorney General
Chief, Litigation Section

Gregory R. Neuhauser
Senior Deputy Attorney General

Attorneys for Petitioner

OFFICE OF ATTORNEY GENERAL
206 State Office Bldg.
Philadelphia, PA 19130
Telephone (215) 560-2402

Dated: December 1, 1988